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No. 07-402

In the Supreme Court of the United States

FOOD EXPRESS, INC.,

Petitioner,

v.

LARIE E. BOSTAIN ET UX.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE WASHINGTON TRUCKING ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE WASHINGTON TRUCKING ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States, including tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers.

The Washington Trucking Associations ("WTA") is a non-profit corporation established in 1922 by a group of truck owners for the purpose of protecting and promoting the interests of the State's trucking industry. Its members include common carriers, private carriers, dump truckers, log truckers, movers, and suppliers. The WTA serves its members by promoting safe, efficient, and cost-effective business practices, encouraging pro-competitive legislation, improving highway safety through education and legislation, and supporting technologies and innovations that enhance operations, safety, and the environment.

Amici regularly advocate on behalf of the trucking industry in this Court and other courts. *Amici* and their members have a strong interest in motor carrier regulation generally, and ATA has special familiarity with the Federal Aviation

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Administration Authorization Act ("FAAAA") preemption issue in this case because it actively participated in the formulation of federal motor carrier deregulation policy in Congress. H.R. CONF. REP. NO. 103-677, at 88 (1994), reprinted in 1994 U.S.C.C.A.N. at 1760. *Amici* also have a strong interest in preserving the uniformity of wage and hour regulation of interstate truck drivers that is an important objective of the 1935 Motor Carrier Act ("MCA") and the motor carrier exemption to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(1). Finally, *amici* desire to represent the interests of their members that are directly affected by the decision below and bring to the Court's attention concerns that the petition implicates but does not address directly.

BACKGROUND

Petitioner Food Express, Inc., "a California corporation, headquartered in Arcadia, California," "hauls food products between points in several western states." Pet App. 2a; see Food Express, Inc., http://www.foodexp.com/index.html and links therefrom (Food Express operates in eleven Western States and British Columbia and has terminals in California, Washington, and Utah and "equipment stationed in locations from [Arizona to Washington to Montana to Utah]"). Consistent with Food Express's interstate operations, Respondent Larie E. Bostain spent approximately sixty-three percent of his driving time in States other than Washington. Pet App. 3a. Food Express fired Bostain in 2002 after he disobeyed orders to spend the night in Oregon because he had exceeded his permissible driving time under federal law. *Id.* 3a & n.1.

Bostain's travels are typical of interstate truck drivers. In fact, many drivers cover many more States and spend far more time driving outside of their home State than Bostain. For example, the Federal Motor Carrier Safety Administration ("FMCSA") described the schedules of typical "random service" drivers as follows:

> [The] company's trucks do not follow any fixed pattern. Following restarts at home, drivers pick up outbound loads near their home terminal and begin a road tour. Thereafter, the company's sales force does its best to find loads for the random drivers and keep them moving profitably until they complete their road tours and come home. Most road tours will last from one to three weeks.

Hours of Service of Drivers, 70 Fed. Reg. 49,978, 50,047 (Aug. 25, 2005); see also *ibid.* (describing "the working environment of the over-the-road driver" as "quite different from" "'normal' employment").

The Bureau of Labor Statistics similarly notes that "[m]any routes are from city to city and cover long distances. Some companies use two drivers on very long runs—one drives while the other sleeps in a berth behind the cab. These 'sleeper' runs can last for days, or even weeks." U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, Truck Drivers and Driver/Sales Workers, *available at* http://www.bls.gov/oco/ocos246.htm.

The description of an interstate truck driver's travels in a Fourth Circuit opinion is also informative:

> Coffman made his first trip as an interstate truck driver for Deaton on March 3, 1992 * * *. During [the next] two weeks, he made seven trips, which included pickups and deliveries in six different states * * *. He was on the road continuously [during that time], and never returned to [his home] terminal [in North Carolina]. Coffman parked his tractor in North Carolina only once—when he stopped at his home overnight while traveling from Maryland to Georgia. The load Coffman was carrying at the time of his injury was picked up by him * * * in Birmingham, Alabama, and delivered to Charlotte, North Carolina.

TIG Ins. Co. v. *Deaton, Inc.*, 166 F.3d 334 (table), 1998 WL 886890, at *1 (4th Cir. 1998); see also JOHN MCPHEE, UNCOMMON CARRIERS 238-39 (2006) (describing a driver's travels to 46 States and 3 Canadian provinces, including, *inter alia*, hauls from Pennsylvania to Utah, Georgia to California, and Louisiana to Saskatchewan).

Indeed, one driver-turned-sociologist described the "ideal driver" as one who "operates over the road." LAWRENCE J. OUELLET, PEDAL TO THE METAL: THE WORK LIVES OF TRUCKERS 140 (Temple Univ. Press 1994). "[T]hat is, his hauls are not restricted to a single city or urban area; ideally he hauls for distances that take days to cover. He travels to a variety of destinations and encounters all sorts of terrain, weather, and driving conditions." *Ibid.* (footnote omitted).

Thus, depending on the destinations of the loads he picks up, a driver may travel across several States or even cross-country before returning home days or weeks later. And because loads typically become available on short notice, interstate trucking truly is "a business requiring fluctuating hours of employment" (*Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44, 48 (1943)) with extended stretches of time on the road followed by long off-duty periods. This highly unstructured job does not fit neatly into an eight-hour day or forty-hour work week. Within the safety-focused limits established by the federal Hours-of-Service rules, drivers must remain available to work the irregular hours necessary to get the job done, and carriers must retain the flexibility to utilize their drivers efficiently in order to distribute food, fuel, retail products, medical supplies, components, raw materials, and other commodities throughout the country. See ATA White Paper, *When Trucks Stop, America Stops*, July 14, 2006, *at* http://tinyurl.com/3yr43o (describing the interstate trucking industry's role in the distribution various commodities).

The decision below must be assessed in this context: The fact that a driver is technically "based" in a particular State does not mean that he spends most or even much of his

driving time there, as drivers regularly are away from their home State for days or weeks at a time. Rather, as a practical matter, interstate truck drivers are based in the federally regulated channels of interstate commerce, not the terminal to which they return at the conclusion of their runs. Cf. *Pierce County, Wash.* v. *Guillen*, 537 U.S. 129, 146-47 (2003) ("It is well established that the Commerce Clause gives Congress authority to regulate the use of the channels of interstate commerce," including providing for "greater safety on our Nation's roads.") (internal quotation marks omitted); PHILLIP WILSON, DRIVER: SIX WEEKS IN AN EIGHTEEN-WHEELER 369 (2005) (In the course of "travel[ing] this indescribable continent" as an interstate truck driver, "I will go northern border to southern border and sea to shining sea and along both sides of all the Great Lakes and into Canada many times. * * * Where I am and what day it is just won't matter.").

SUMMARY OF ARGUMENT

Since the enactment of the MCA in 1935, the federal government has regulated the hours of service of interstate truck drivers. When it enacted the FLSA just three years later, Congress made the further determination that the federal Hours-of-Service rules ("HOS rules") promulgated under the MCA should be the ***only*** rules governing the hours of interstate truck drivers. The FLSA therefore exempts such drivers from its overtime pay requirements so that, "in a business requiring fluctuating hours of employment," operators and regulators may establish driving schedules and limitations thereon "***without the burden of additional pay for overtime***." *Southland Gasoline*, 319 U.S. at 48 (emphasis added). The exemption is also intended "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Id.* at 48-49.

Despite this longstanding federal policy that the hours of interstate truck drivers should not be burdened by overtime pay or subject to regulation by two federal agencies, the court below held, in a 5-4 decision, that individual ***States*** may im-

pose the same burden and that ***fifty different state agencies*** may regulate the same issue. That decision is wrong and warrants review by this Court for four reasons:

First, it conflicts with the MCA and this Court's decision in *Southland Gasoline*.

Second, by holding that the Washington Minimum Wage Act ("WMWA") applies to hours worked in other States, the Washington Supreme Court transformed the WMWA into an extraterritorial regulation of commerce that is per se invalid under the Commerce Clause and, among other precedents, *Healy* v. *The Beer Inst.*, 491 U.S. 324 (1989). In applying the lenient *Pike* balancing test to this extraterritorial regulation, the court below defied uniform federal precedent holding that such regulations are per se unconstitutional.

Third, the reasoning of the decision below would subject motor carriers to the overtime laws of every State through which their drivers pass. Because, as discussed in Part I, *infra*, drivers often travel through several States in the course of any given week, such a rule would require motor carriers to perform recurring, nightmarish choice-of-law analyses just to pay their drivers and would thereby constitute an impermissible burden on interstate commerce.

Fourth, as interpreted by the court below, the WMWA's overtime requirement has "the force and effect of [a] law related to a price, route, or service of [a] motor carrier." 49 U.S.C. § 14501(c)(1). Such laws are preempted by the FAAAA. See *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992); *Rowe* v. *N.H. Motor Transp. Ass'n*, 448 F.3d 66, 75 (1st Cir. 2006), cert. granted, 127 S. Ct. 3037 (2007) (No. 06-457). Citing a Ninth Circuit decision and various ERISA cases, the court below justified its ruling to the contrary by asserting that this "Court has * * * pulled back" from *Morales*. That holding is in direct conflict with decisions of the First and Seventh Circuits (although it is consistent with decisions of the Second and Ninth Circuits). It also ignores

this Court's directive that lower courts must "follow [precedent] which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989).

ARGUMENT

I. Review Is Necessary Because The Decision Below Conflicts With The MCA And This Court's Decision In *Southland Gasoline*.

"For years, federal regulators have limited the hours of service that truckers, as well as other operators of various vehicles in the transportation industry, can work and operate their motorized conveyances." *Pub. Citizen* v. *FMCSA*, 374 F.3d 1209, 1211 (D.C. Cir. 2004). Beginning in 1935, the MCA "vested in the Interstate Commerce Commission ['ICC'] power to establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation and equipment of common and contract carriers by motor vehicle." *Levinson* v. *Spector Motor Serv.*, 330 U.S. 649, 658 (1947). Today, "[t]he FMCSA, created by statute in 1999, is the agency charged with promulgating HOS rules regulating drivers of commercial motor vehicles." *Pub. Citizen*, 374 F.3d at 1211; see 49 U.S.C. §§ 113 & 31502(b); 49 C.F.R. § 395.3. See generally Hours of Service of Drivers, *supra*, 70 Fed. Reg. at 49,979-80 (history of the HOS rules).

When Congress enacted the FLSA in 1938, it determined that interstate truck drivers' hours of service should be regulated by the HOS rules ***only*** and that the overtime pay provisions of the FLSA—and the Department of Labor regulations promulgated thereunder—should ***not*** apply to drivers. See generally *Southland Gasoline*, 319 U.S. 44. The FLSA therefore provides that its overtime pay provisions "shall not apply with respect to * * * any employee with respect to whom the [FMCSA] has power to establish qualifications and maximum hours of service." 29 U.S.C. § 213(b)(1).

As this Court has explained, "[b]y exempting * * * drivers * * * from the maximum hour limitations of the [FLSA], Congress evidently relied upon the [HOS rules] to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, ***without the burden of additional pay for overtime***." *Southland Gasoline*, 319 U.S. at 48 (emphasis added). A further purpose of the exemption is "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Ibid.*

Southland Gasoline's description of the purpose of the motor carrier exemption is consistent with its legislative history. Then-Senator Black—the FLSA's co-sponsor and later a member of the *Southland Gasoline* Court—explained that truck drivers were exempted because "it was the policy of the committee * * * to write the bill in such a way as not to ***conflict*** with [their] regulation" "by the [ICC]." Note, *Safety and Overtime Pay: The Motor Carrier Exemption from the FLSA*, 57 YALE L.J. 1129, 1133 n.19 (1948) (quoting 81 Cong. Rec. 7875 (1937)) (emphasis added). Senator Black continued: 'The committee were of the opinion * * * that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety." *Ibid.* (quoting same) (ellipsis by the Note; emphasis by the Note omitted).

Plainly, "additional pay for overtime" required by state law is no less a "burden" than federal overtime. Likewise, it would make no sense for Congress to "free" motor carriers from "regulation by two agencies" at the federal level only to subject them to the whims of fifty different state regulators. Thus, because the motor carrier exemption reflects a congressional judgment that overtime pay and dual regulation would affirmatively ***conflict*** with the purposes and objectives of the MCA and the federal HOS rules, application of the WMWA to interstate truck drivers is preempted. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (state law is preempted if

it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

In the 1970s and 1980s, however, three federal circuits held that the MCA does not preempt state overtime laws.[2] The analyses of the Second and Ninth Circuits run less than a page each; the D.C. Circuit—the first court to address the issue—devoted about two pages. Each of these opinions relied, directly or indirectly, on this Court's statement in *Levinson* that "[t]here is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done." *Williams*, 472 F.2d at 1264 (quoting *Levinson*, 330 U.S. at 661); see *Pettis Moving Co.*, 784 F.2d at 441 (same);

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[2] *Agsalud* v. *Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987); *Pettis Moving Co.* v. *Roberts*, 784 F.2d 439 (2d Cir.1986); *Williams* v. *W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972); accord *Cent. Delivery Serv.* v. *Burch*, 355 F. Supp. 954 (D. Md.), aff'd mem., 486 F.2d 1399 (4th Cir. 1973); *Dep't of Labor & Indus.* v. *Common Carriers, Inc.*, 762 P.2d 348 (Wash. 1988). But see *Coil* v. *Jack Tanner Co.*, 242 F. Supp. 2d 555, 559 (S.D. Ill. 2002) (holding that the FLSA's exemption for seamen preempted state overtime requirements because Congress "[n]ot only [exempted] seamen from [the] overtime provisions in the FLSA, but also determined a detailed breakdown of the standards governing the hours of seamen") (citing 46 U.S.C. § 8104); *Thompson* v. *Shaw's Supermarkets, Inc.*, 847 A.2d 406, 410 (Me. 2004) (explaining that, for more than thirty years, interstate truck drivers had been exempted from the Maine overtime statute based on the opinions of the state attorney general and department of labor that federal law would preempt the statute's application to them); *Strain* v. *West Travel, Inc.*, 70 P.3d 158, 163 (Wash. App. 2003) (holding that federal maritime law preempts state wage and hour statutes as applied to cruise ship employees because requiring cruise ship operators to "pay each worker according to the laws of the worker's home state" would create "a nightmarish accounting prospect"), rev. denied, 82 P.3d 243 (Wash. 2004).

Agsalud, 833 F.2d at 810 (citing *Williams*, *Pettis Moving Co.*, and *Burch* and holding that Hawaii's overtime pay requirement was not preempted because it did not have "the same effect as a regulation setting a firm maximum on hours worked"); see also *Burch*, 355 F. Supp. at 959 (same as *Williams*); *Common Carriers*, 762 P.2d at 350 (same).

The error of these decisions is their reliance on dicta taken out of context. In context, the passing observation they quote is consistent with the statutory purpose that this Court identified in *Southland Gasoline*. The *Levinson* Court stated:

> The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety program which it and the [ICC] have been developing for motor carriers * * *. To do this, Congress has prohibited the overlapping of the jurisdiction of the * * * Department of Labor, with that of the [ICC] as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the [FLSA]. Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the [FLSA].

330 U.S. at 661-62 (footnote omitted).

The *Levinson* Court thus recognized that the motor carrier exemption reflects a deliberate decision by Congress, "as a primary consideration," to "preserve[] intact" the MCA's

"safety program"—and, crucially, to achieve that objective by "prohibit[ing] the overlapping of the jurisdiction" of overtime regulations and HOS rules. *Ibid.* The Court did observe that, in its own estimation, "Congress ***might*** have done otherwise," but it just as clearly recognized, and gave "full effect to," the approach that Congress ***did*** take. *Ibid.* (emphasis added). *Levinson* is thus entirely consistent with *Southland Gasoline*'s determination that Congress intended "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers" and from "the burden of additional pay for overtime." 319 U.S. at 48.

The lower court decisions denying preemptive effect to the MCA, the federal HOS rules, and the FLSA's motor carrier exemption require correction by this Court. Twenty to thirty-five years after the fact, these courts are unlikely to correct their own mistakes. Moreover, because many other States already exempt interstate truck drivers from their overtime laws,[3] opinions from additional federal circuits or state courts of last resort will likely be few and far between. This case therefore presents an appropriate vehicle for addressing the issue, in conjunction with the issues addressed below.[4]

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[3] See, *e.g.*, Ark. Code § 11-4-211(e); 820 Ill. Comp. Stat. § 105/3(d)(7); Ind. Code § 22-2-2-3; Ky. Rev. Stat. § 337.285; Mo. Rev. Stat. § 290.505.3; Mont. Code § 39-3-406(2)(a); Nev. Rev. Stat. § 608.018.3(f); N.C. Gen. Stat. § 95-25.14(c)(1); Or. Admin. Reg. § 839-20-0125(3); 43 Pa. Stat. Ann. § 333.105(b)(7); R.I. Gen. Laws § 28-12-4.3(a)(7); W. Va. Code § 21-5C-1(f)(17).

[4] We acknowledge that the MCA preemption issue was not raised in the petition or the courts below. Nevertheless, "the relationship between legislative and judicial enforcement of the Commerce Clause is close enough for the pre-emption issue to come, if by the barest of margins, within those subsidiary questions fairly included in the principal question on appeal." *Ark. Elec. Coop. Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983) (internal quotation marks and alteration omitted) (addressing preemption issue raised by the Government as *amicus curiae* but not presented

II. Review Is Necessary Because The Decision Below Endorses An Extraterritorial Regulation Of Commerce In Conflict With The Decisions Of This Court And The Federal Circuits.

By extending the WMWA to hours worked outside the State, the court below transformed the statute into a regulation of interstate commerce occurring wholly in other States in conflict with this Court's decisions in *Healy*, *supra*,

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in the appellant's jurisdictional statement); see also, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-98 (1984) (reversing based on preemption issue raised by the FCC as *amicus curiae* but not presented in the petition or decided by the courts below); *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975) (addressing statutory issue raised by *amici curiae* seeking reversal but not included in the petition or the petitioner's merits brief, which raised only constitutional questions); *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960) (reversing based on preemption issue not raised in the petition rather than reaching constitutional questions presented, including a dormant Commerce Clause challenge, given that the statutory and constitutional questions were substantively similar). The MCA preemption issue—whether Congress intended to exempt motor carriers from the "burden of additional pay for overtime"—and the *Pike* balancing and FAAAA preemption questions—whether such overtime requirements do impermissibly burden motor carriers—are closely related. Indeed, MCA preemption and unconstitutionality under the dormant Commerce Clause are essentially two sides of the same coin: whether the federal "Power ... To regulate Commerce," through its affirmative exercise or negative implications, preempts the WMWA as it was interpreted and applied below. Given this close relationship, and in order to preserve the option of avoiding difficult constitutional questions, the Court should grant the petition and order briefing and argument on the MCA preemption issue in addition to the questions presented in the petition. See *Capital Cities Cable*, 467 U.S. at 698 (noting that "the parties * * * briefed and argued the [preemption] question pursuant to our order"); *Capital Cities Cable, Inc.* v. *Crisp*, 464 U.S. 813 (1983) (mem. order).

Brown-Forman Distillers Corp. v. *N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Healy*, this Court distilled three fundamental constitutional principles from the Court's precedents: "First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[.]" 491 U.S. at 336 (ellipsis and internal quotation marks omitted). Second, if a statute's "practical effect * * * is to control conduct beyond the boundaries of the State," then it "exceeds the inherent limits of the enacting State's authority and is invalid." *Ibid.* "Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how [it] may interact with the [laws] of other States and" the likely impact of similar enactments by other States or every State. *Ibid.* Put simply, the Commerce Clause prohibits "the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 337.

As interpreted by the court below, the WMWA applies to and "directly controls commerce occurring wholly outside the boundaries of [the] State," namely, wages paid to interstate truck drivers for hours worked in other States. Just as this Court held that Connecticut could not regulate the price of beer in other States (*id.* at 337-38) and that New York could not regulate the price of liquor or milk in other States (*Brown-Forman Distillers*, 476 U.S. at 579-84; *Baldwin*, 294 U.S. at 521), Washington may not regulate the price of labor in other States. Indeed, whereas the statutes that this Court previously struck down regulated out-of-state commerce only indirectly by placing conditions on in-state sales,[5] the deci-

[5] See *Healy* 491 U.S. at 326 (statute required out-of-state beer shippers to affirm that the prices offered to in-state wholesalers were no greater than those offered in neighboring States); *Brown-Forman Distillers*, 476 U.S. at 575 (similar statute governing liquor sales); *Baldwin*, 294 U.S. at 519 (statute provided that "there

sion below interprets the WMWA to ***directly*** regulate the wages paid for out-of-state labor. As noted above, many States have followed the federal lead and exempted interstate truck drivers from their overtime requirements (see *supra* page 11 & note 3), presumably out of deference to the safety-focused federal HOS regulations (or else because they believe that such state regulations would be preempted). By "project[ing]" its legislation into those States and overriding their policies, Washington has "exceed[ed] the inherent limits of [its] authority." *Healy*, 491 U.S. at 336-37. Moreover, if many States or every State did "adopt[] similar legislation," the effect would be a dense and overlapping web of overtime laws of uncertain applicability. *Id.* at 336. Therefore, as applied to hours worked outside of Washington, the WMWA is per se invalid under the Commerce Clause.

That the result below is contrary to this Court's decisions is not surprising given that its reasoning reflects a fundamental misunderstanding and misapplication of those precedents. Specifically, the court below held that "extraterritoriality analysis [is just a] facet[] of the *Pike* [balancing] test" and sought to justify the statute's extraterritorial application based on its purported "local benefits." Pet. App. 20a-21a. Although a majority of this Court has never explicitly stated that state statutes regulating out-of-state commerce are per se unconstitutional, that proposition is implicit in its opinions (see *Healy*, 491 U.S. at 336; *Brown-Forman Distillers*, 476 U.S. at 578-84; *Edgar* v. *Mite Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion); *Baldwin*, 294 U.S. at 521-24; BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.06[F] (1999)), and every court of appeals that has addressed the issue has so held.[6] The

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shall be no sale within the state of milk bought outside unless the price paid to the producers was" equal to or greater than the minimum price set by the statute).

[6] *E.g.*, *Carolina Trucks & Equip., Inc.* v. *Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491-92 (4th Cir. 2007); *Wine & Spirits Retail-*

Court should therefore grant the petition to correct this misapplication of its extraterritoriality precedents and to clarify that such statues cannot be justified based on purported "local benefits."

III. Review Is Necessary Because The Decision Below Departs From This Court's Precedents Holding That Slight And Dubious Local Benefits Cannot Justify Substantial, Disruptive Burdens On Interstate Commerce And Vital Interstate Industries.

As discussed in Part I, interstate truck drivers frequently travel to several different States in the course of a single week and, like Bostain, spend a majority of their driving time outside their home State. Subjecting interstate motor carriers to the vagaries of the wage and hour laws of all the various States through which their drivers pass would impose a substantial and unjustifiable burden on their operations.

Indeed, merely determining ***which*** State's law would apply to a particular driver in any given week would be a daunting task fraught with uncertainty.[7] While the court be-

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ers, Inc. v. *Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007); *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Dean Foods Co.* v. *Brancel*, 187 F.3d 609, 616 (7th Cir. 1999); *ACLU* v. *Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *Cotto Waxo Co.* v. *Williams*, 46 F.3d 790, 793 (8th Cir. 1995); *NCAA* v. *Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

[7] See Pet. App. 40a (noting the "unenviable task of researching and resolving" choice-of-law issues created by the decision below). As one commentator has explained, many courts determine whether a plaintiff may sue under a state statute by attempting to divine "legislative intent," an approach that is inherently unpredictable because "legislatures rarely give [the choice-of-law issue] any thought," and, "[w]ith a state statute, * * * legislative history is often limited and difficult to obtain." Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. REV. 1050, 1050-52 (2005). The author advocates instead a "common law * * * choice of law analysis" "focus[ing] on

low offered repeated assurances that the WMWA will apply to "Washington-based employees" only,[8] carriers can hardly assume that other States will follow suit (or that Washington law will not be reinterpreted in future cases). For example, if a driver is "based" in Washington but spends three times as much time in California, California would seem to have the more significant relationship to any overtime claim. Or if a driver splits his time relatively equally among six different States, each State would have a plausible basis for applying its statute. Different courts applying varying choice-of-law analyses are likely to reach inconsistent results so that more than one State's law could apply to a single driver. Moreover, for "random service" drivers with irregular routes (see Part I, *supra*), carriers would have to re-evaluate this difficult and uncertain legal issue on an almost weekly basis.

To be sure, employers with multi-state operations inevitably encounter difficult choice-of-law issues from time to time, and not every such problem raises a constitutional question. That is not the issue here. Rather, the decision below imposes a substantial and recurring burden on an interstate

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which state has the most significant relationship with the cause of action, or on which state has the greatest interest in having its law applied." *Id.* at 1052. Given the number of states through which an interstate truck driver may travel in a particular week, however, either approach would create massive uncertainty in this context.

[8] Even these assurances ring hollow given that "[w]hether overtime * * * must be paid for an employee as a Washington-based employee will depend on factors that courts routinely use for deciding choice of laws issues." Pet App. 11a n.5; 41a. The term "Washington-based employee" is not defined by statute or regulation, and the court gave no other guidance on the issue, which suggests that "a series of case-by-case lawsuits" will be necessary to clarify the term. Michael Killeen, Davis Wright Tremaine Advisory Bulletin, *Washington's Supreme Court Says State Wage/Hour Law Applies to Work Performed Outside of Washington State*, *at* http://www.dwt.com/practc/empservices/bulletins/03-07_WageHourLaw.htm.

industry of vital importance to the national economy and the channels of interstate commerce[9] by introducing significant uncertainty into its basic payroll processes on a weekly basis. That burden is "clearly excessive in relation to" the minimal "putative local benefits" of applying the WMWA extraterritorially.[10] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court should grant review to reaffirm that such "slight and dubious" local benefits cannot justify burdens on interstate commerce in general—and the vital freight transport industry in particular—that disrupt "needed [national] uniformity," thereby "increasing * * * cost[s] and impairing * * * efficiency." *S. Pac. Co.* v. *Arizona*, 325 U.S. 761, 779-80 (1945); accord, *e.g.*, *Kassel* v. *Consol. Freightways Corp.*, 450 U.S. 662, 671-79 (1981) (plurality opinion); *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 442-48 (1978).

IV. Review Is Necessary Because The Court Below Assumed The Prerogative Of Overruling This Court's Decision In *Morales* And Interpreted The WMWA In A Manner That Conflicts With The FAAAA.

The FAAAA preempts any "law * * * related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). This preemption provision was modeled after the Airline Deregulation Act's preemption provision and was

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[9] As of the 2002 Economic Census, the trucking industry transported nearly eight billion tons of freight (more than two-thirds of all freight shipped in the United States) with a value of more than $6 trillion. U.S. Census Bureau, 2002 Economic Census, 2002 Commodity Flow Survey, tbl.1a (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tcf-us.pdf.

[10] As noted by the dissent below, "the public purpose of the [WMWA] is focused on promoting employment and compensating employees within the state of Washington," interests which are not furthered by, and are "largely unrelated to," its extraterritorial extension. Pet. App. 41a. Indeed, if anything, the decision creates an incentive for interstate employees to employee drivers "based" in other States whenever feasible.

intended to incorporate "the broad preemption interpretation adopted by [this] Court in *Morales*." H.R. CONF. REP. NO. 103-677, *supra*, at 83; see *Rowe*, 448 F.3d at 75. As this Court held in *Morales*, the language Congress selected is "deliberately expansive, and conspicuous for its breadth." 504 U.S. at 384 (internal quotation marks and citation omitted). Accordingly, it preempts any law that makes express "reference to" or has a "forbidden significant effect" on prices, routes, or services. *Id.* at 388 (internal quotation marks omitted).

The purpose of this provision is to free motor carriers from the "patchwork" of state regulations that had developed prior to its enactment. H.R. CONF. REP. NO. 103-677, *supra*, at 87. Congress found that such inconsistent regulation "cause[d] significant inefficiencies" and "increased costs" and that "[t]he sheer diversity of * * * regulatory schemes [was] a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.*

As interpreted by the court below, the WMWA has a "forbidden significant effect" on the prices, routes, and services of motor carriers. If interstate motor carriers must pay overtime to drivers, then they will increase their prices and alter their routes and services accordingly. This is not speculation; it is basic economics.[11] Nor is this relationship "too

[11] Indeed, in the course of (erroneously) holding that the MCA does not preempt state overtime requirements as applied to interstate truck drivers, the Ninth Circuit made the case for FAAAA preemption: "One need not be an economist to realize that ***some*** employers ***may*** continue to provide more than 40 hours of work even though an overtime premium is required, because paying the premium ***may*** be cheaper than the alternatives of ***not providing service to customers*** or hiring more help." *Agsalud*, 833 F.2d at 810 (emphases added). Because the FAAAA preempts state laws that "relate[] to ***a*** price, route, or service of ***any*** motor carrier" (49 U.S.C. § 14501(c) (emphasis added); see *Rowe*, 448 F.3d at 72-73), the fact that "some employers" will alter their services (or

tenuous, remote, or peripheral" to be preempted. *Morales*, 504 U.S. at 390. If States require motor carriers to pay overtime not required by federal law, that will have a very ***direct*** impact on their rates: if the driver must be paid more, then the delivery will cost more. And if the market will not bear increased rates, carriers will be forced to reconsider their routes and services. See *id.* at 388 ("it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares"); *Rowe*, 448 F.3d at 81 (holding that the FAAAA preempts a state statute that "has the effect of forcing UPS to change its uniform package-processing procedures"); see also *Morales*, 504 U.S. at 386 (rejecting as "irrational" the argument that the ADA does not preempt "laws of general applicability" such as state consumer protection statutes). Allowing Washington's overtime requirement to stand will also expose motor carriers to precisely the sort of "patchwork" of regulations that the FAAAA was intended to prevent. See Part III, *supra*.

The court below sought to avoid *Morales*'s preemptive effect by asserting that *Morales* is no longer good law, citing a Ninth Circuit decision and various ERISA cases. Pet. App. at 23a n.9 (asserting that this "Court has * * * pulled back from" *Morales* and citing *Californians for Safe & Competitive Dump Truck Transportation* v. *Mendonca*, 152 F.3d 1184 (9th Cir. 1998)). This claim is illogical given that Congress specifically intended the FAAAA to incorporate the preemptive scope articulated in *Morales*; obviously, Congress did ***not*** incorporate ERISA cases that post-date the FAAAA's enactment. The court below thus committed a fundamental error by ignoring "precedent of this Court [that] has direct application" and instead assuming for itself "the prerogative of overruling" that precedent. *Rodriguez de Quijas*, 490 U.S. at 484.

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prices) in response to the WMWA's expansion establishes preemption under the FAAAA.

The Second and Ninth Circuits have also assumed the prerogative of overruling *Morales*. See *Abdu-Brisson* v. *Delta Airlines, Inc.*, 128 F.3d 77, 82-83 (2d Cir. 1997) (ADA preemption); *Mendonca*, 152 F.3d at 1189. In contrast, the First and Seventh Circuits have rejected invitations to do so, holding that *Morales* remains good law—indeed, "the seminal case"—for purposes of FAAAA and ADA preemption. *Rowe*, 448 F.3d at 75-76; *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir.2000) (Easterbrook, J.) (ADA preemption); see also, *e.g.*, *In re Jet Blue Airways Privacy Litig.*, 379 F. Supp. 2d 299, 314-15 & n.11 (S.D.N.Y. 2005) (noting this disagreement); *Leonard* v. *Nw. Airlines, Inc.*, 605 N.W.2d 425, 430 (Minn. App. 2000) (same). Because the Washington Supreme Court's expansion of the WMWA is preempted under *Morales*, this Court should grant the petition to resolve the growing disagreement in the lower courts concerning *Morales*'s continuing viability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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